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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1941

NO.

KEYSTONE AUTOMOBILE CLUB CASUALTY CO.,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review,

KEYSTONE AUTOMOBILE CLUB FIRE CO.,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, the Keystone Automobile Club Casualty Company and the Keystone Automobile Club Fire Company, respectfully pray that a Writ of Certiorari issue to the Circuit Court of Appeals for the Third Circuit to review a judgment of that Court in the above entitled cause, entered on October 30, 1941.

Opinions Below

The United States Board of Tax Appeals promulgated two Opinions in the case separated by a period of one year. The Original Opinion was promulgated July 27, 1939 and was reported at 40 B. T. A. 291 (R. 1-25). The Original Opinion was modified by a Supplemental Opinion promulgated July 16, 1940 and reported at 42 B. T. A. 356 (R. 77-81). The Opinion of the United States Circuit Court of Appeals is reported at 122 Fed. (2nd) 886 (R. 304-312).

Jurisdiction

Petition for Rehearing was denied by the Circuit Court of Appeals on October 30, 1941 (R. 328). The jurisdiction of this Court is evoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, §1, 43 Stat. 938, 28 U. S. C. A. §347.

Questions Presented

1. Is Article 1014 of Treasury Regulations 74, which provides that:

> "* * * A stock fire insurance company, operated on the mutual plan to the extent of paying dividends to certain classes of policyholders, may make a return on the same basis as a mutual fire insurance com-

pany with respect to its business conducted on the mutual plan."

a valid regulations under Section 208 (c) (3) of the Revenue Act of 1928 and the corresponding sections of subsequent Revenue Acts?

2. Did Congress by the reenactment of Section 234 (a) (14), Revenue Act of 1918 in identical words in the subsequent Revenue Acts of 1921 (Sec. 234 (a) (13)), 1924 (Sec. 234 (a) (11)), 1926 (Sec. 234 (a) (11)), 1928 (Sec. 208 (c) (3)), 1932 (Sec. 208 (c) (3)), 1934 (Sec. 207 (c) (3)), 1936 (Sec. 207 (c) (3)), 1938 (Sec. 207 (c) (3)), and Sec. 207 (c) (3) of the Internal Revenue Code, approve and adopt the aforesaid administrative Regulation originally promulgated in the year 1920 in Regulations 45 and continued in force under all of the subsequent Revenue Acts referred to?

Statutes and Regulations Involved

Section 208 (c) (3) of the Revenue Acts of 1928 and 1932 and Section 207 (c) (3) of the Revenue Act of 1934 permits deductions as follows:

"In the case of mutual insurance companies (including interinsurers and reciprocal underwriters, but not including mutual life or mutual marine insurance companies) requiring their members to make premium deposits to provide for losses and expenses, the amount of premium deposits returned to their policyholders and the amount of premium deposits retained for the payment of losses, expenses and reinsurance reserves."

Article 1014 of Regulations 74 and 77 and Article 207-5 of Regulations 86 (as amended by T. D. 4697—September 22, 1936—XV-2 C. B. 167), provide:

> "* * * A stock fire insurance company, operated on the mutual plan to the extent of paying dividends to certain classes of policyholders, may make a return on the same basis as a mutual fire insurance company with respect to its business conducted on the mutual plan".

The sections of all the Revenue Acts referred to above are quoted in full in the Appendix to the Brief accompanying this Petition, pp. 29 to 35.

All regulations referred to above are quoted in full in the said Appendix, pp. 35 to 43.

Statement of the Case

This was an action by the Keystone Automobile Club Casualty Company and the Keystone Automobile Club Fire Company against the Commissioner of Internal Revenue to review the decisions of the United States Board of Tax Appeals covering the taxable years 1929 to 1935, inclusive and entered of record as of July 17, 1940 (R. pp. J to L). These decisions were affirmed by the Circuit Court of Appeals for the Third Circuit in an Opinion filed September 10, 1941 (R. 304-312), and a Petition for Rehearing was denied by that Court on October 30, 1941 (R. 328). The following deficiencies were determined by the Board of Tax Appeals and affirmed by the Circuit Court (R. 2, 312):

Keystone Automobile Club Casualty Co.

Year	*Income Tax*
1929	$ 6,796.46
1930	9,554.06
1931	4,330.12
1932	48,824.29
1933	45,546.00
1934	.....
1935	12,418.87
Total	$127,469.80

Keystone Automobile Club Fire Co.

Year	*Income Tax*
1929	$ 9,232.12
1930	8,044.91
1931	5,392.74
1932	3,753.58
1933	3,770.47
1934	5,213.01
1935	4,454.43
Total	$39,861.26

The deficiencies, determined by the Board for the years involved and affirmed by the Circuit Court, were computed on the basis of net taxable income substantially the same in amounts as the amounts of deductions taken on the returns for "premium deposits retained for the payment of losses, expenses and reinsurance reserves." This is illustrated by the following table:

Casualty Company

Year	*Amounts Deducted on Return as Premium Deposits Retained and Credited to Contingent Reserve*	*Net Taxable Income as Determined by Commissioner*
1929	$57,518.42	$61,785.99
1930	72,532.14	79,617.14
1931	34,825.48	36,084.35
1932	357,844.82	355,085.77
1933	335,309.46	331,243.61
1934	(-7,339.95)	(-36,008.18) (Loss)
1935	90,626.41	90,319.06

Fire Company

1929	83,928.40	83,928.40
1930	66,800.91	67,040.91
1931	44,644.20	44,939.52
1932	27,298.77	27,298.77
1933	27,367.63	27,421.63
1934	40,662.97	37,912.82
1935	32,395.84	32,395.84

The differences as shown in the two columns above are due to the inclusion or exclusion of minor items by the Commissioner and the Petitioners. (Statistical Table, R. 137; Pet. Exh. 64, R. 138).

In the Original Opinion the Board allowed the deduction for the amount of "premium deposits returned" to policyholders, but disallowed the deduction for "premium deposits retained" on the grounds that the evidence did not show that the premium deposits had been retained to pay "incurred" losses and "accrued" expenses in accordance with the interpretation of Section 207 (c) (3) of the Reve-

nue Act of 1934 as set forth in Article 207-1, Regulations 86, as originally promulgated February 11, 1935.

This article of Regulations 86 containing the said provision setting forth said definition, however, was *revoked* retroactively as of the date of its issue by Treasury Decision 4697 approved September 22, 1936. Treasury Decision 4697 (XV-2 CB-167) restored the former articles theretofore in force, and which had previously appeared as Articles 1011 to 1015, inclusive, in Regulations 74 and 77 and which have since been in force in Regulations 86 and subsequent regulations as Articles 207-1 to 207-7, inclusive. The regulation of February 11, 1935 could, therefore, furnish no ground for the Board's decision. The same interpretation of the term "premium deposits retained" which had been in force since 1918, and which had been repromulgated in each of the successive sets of Income Tax Regulations 45, 62, 65, 69, 74 and 77 (Acts of 1918 to 1932, inclusive), was thus expressly restored and continued in Regulations 86, and has also been continued in Income Tax Regulations 94, 101 and 103 (Acts of 1936 to 1941, inclusive).

The only hiatus in the continuity of the interpretation of Section 208 (c) (3) of the Revenue Act of 1928 and the corresponding sections of prior and subsequent revenue acts, was expressed by the applicable articles of regulations promulgated by the Secretary of the Treasury which appeared in Regulations 86, Article 207-1 (1934 Act), and which were thereafter retroactively revoked. From 1918 to date (1941) there has been no substantial change in the sections of revenue acts applicable to the allowance of special deductions permitted "Mutual Insurance Companies Other than Life" which are taxable.

The Commissioner issued, on or about August 1, 1935, an Office Decision which provided that the application of Article 207-1, Regulations 86 (as originally promulgated) should be confined to returns for taxable years beginning after December 31, 1933 (I. T. 2907, XIV-2 C. B. 150). The Board in its Original Opinion applied the revoked interpre-

tation to the years 1929 to 1933 as well as to 1934 and 1935.

The error of the Board in the Original Opinion was so flagrantly obvious, that Petitioners' counsel immediately directed the attention of the Member responsible for the Opinion to the error, according the opportunity for correction by the Board itself, in preference to a prompt filing of a Petition for Review and a correction of the error in the Circuit Court.

The Member recognized the error and ordered the decisions vacated, but it was too late at that time to withdraw the Opinion due to its official publication.

At the direction of the Board a further hearing was held October 4, 1939, but the introduction of further evidence was not permitted. The Board promulgated a Supplemental Opinion July 17, 1940, same being reported at 42 B. T. A. 356.

The Supplemental Opinion (R. 77-81) did not change the Findings of Fact as set out in the Original Opinion (R. 1-25). It reaffirmed that both Petitioners, while organized as stock companies, were operated on a mutual plan for the sole benefit of the policyholders (R. 7, 15, 78), and without any profit whatever for the sole stockholder, i. e., the Club (R. 15); that all policyholders were treated exactly alike and like refunds of premium deposits paid to all classes of policyholders (R. 15); it restated that both Petitioners were entitled to take as deductions under the terms of Article 1014, Regulations 74 (Act of 1928) and corresponding articles of Regulations 77 (Act of 1932) and 86 (Act of 1934) the amounts of premium deposits returned to policyholders (R. 78, 79). As to the Petitioners' right to take as a deduction premium deposits retained for the payment of future losses and expenses (and not "incurred" losses and "accrued" expenses), the Board affirmed its Original Opinion (which it admitted was based on error) through the process of a resort to the evidence, stating:

> "* * * that the premium deposits on hand at the end of the taxable years are not shown to have been re-

tained for the payment of losses, expenses, and reinsurance reserves." (R. 79).

The Circuit Court of Appeals affirmed the Board's decisions on entirely different grounds. It held that the Petitioners were not mutuals for "exemption" purposes and that if a company did not meet the tests of a "mutual" for exemption purposes, it likewise could not meet the tests for the purposes of the special deduction for "premium deposits retained" allowed taxable "mutuals" under the provisions of Section 208 (c) (3), Revenue Acts of 1928 and 1932, and Section 207 (c) (3), Revenue Act of 1934. It further held that that part of Article 1014, Regulations 74 and 77, and Article 207-5, Regulations 86, as amended, which had been in force since 1918 and which allowed stock fire and casualty insurance companies operated on the mutual plan to the extent of paying dividends to certain classes of policyholders to make returns on the same basis as mutual fire and casualty insurance companies, was ineffective because this regulation amended the statute by granting a deduction for which the statute made no provision.

Reasons Relied on for the Allowance of the Writ

1. This is a case of first instance and the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

This Court's attention is called to the fact that that part of Article 1014, Regulations 74, and which is here pertinent (see pp. 2, 3, this Petition), has been in effect for twenty (20) years under the ten (10) different Revenue Acts. The Commissioner of Internal Revenue did not pro-

test its validity either before the Board or before the Circuit Court of Appeals, nor did the Board question its validity in either its Original or Supplemental Opinions (R. 1-25 and 77-81).

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court, and has not given proper effect to the applicable decisions of this Court.

This Court's attention is called to the fact that the decision of the Circuit Court of Appeals on the question here presented is in conflict with decisions of this Court in the cases of *Koshland* v. *Helvering,* 298 U. S. 441; *Commissioner* v. *Oregon Mutual Life Ins. Co.,* 311 U. S. 267; *Reynolds Tobacco Co.* v. *Helvering,* 306 U. S. 110; *Provost* v. *U. S.,* 267 U. S. 443; *Pink, Supt.* v. *AAA Highway Express, etc.,* 62 Sup. Ct. Rep. 241 (decided December 8, 1941).

3. The Board of Tax Appeals and the Circuit Court of Appeals both approved the deduction for "premium deposits returned to policyholders", but both the Board and the Circuit Court disallowed the deduction for "premium deposits retained to pay losses and expenses". Both deductions are allowed "mutual" insurance companies under Section 208 (c) (3), Revenue Act of 1928, and both deductions are allowed stock companies operated on the mutual plan under Article 1014, Regulations 74, and under all prior and subsequent Revenue Acts, and the corresponding articles of regulations promulgated under said Revenue Acts.

4. The case is of vital importance to all stock companies operated upon the mutual plan because of the fact that there has been a uniform interpretation of Section 208 (c) (3) of the Revenue Act of 1928 and corresponding sections of prior and subsequent revenue acts for over a period of twenty (20) years as was evidenced by Article